

January 22, 2008

Each year as we begin the process of reviewing the events of the preceding year and analyzing the issues which will impact the trucking industry and its insurers in the coming year, we always start with a look back over the monthly *Bits & Pieces* and the prior year's resumé to determine what affect

reported and anticipated events actually had on the industry. Our reports have generally focused on the economic and political issues at the forefront of the industry at that time. It is interesting to note that despite the often dour forecasts contained therein, the industry has continued to persevere. The same bodes true for this year. While many economic and political changes affected the landscape of the trucking industry overall it has maintained its place as a viable part of our economic community. In today's climate, even maintaining the status quo can be considered a plus for many businesses.

This past year saw the economy hit hard, as housing and auto markets took a big hit. The economic forecast continues to roller coaster as we hear whispers of a full recession in the coming year. The sub-prime mortgage debacle stalled home building, which has seen its largest decline in years. The domino effect is evident in the transportation industry which plays a critical part in the delivery of home products and building materials. Trucking generally serves as a barometer of the U.S. economy because it represents nearly 70 percent of tonnage carried by all modes of domestic freight transportation, including manufactured and retail goods. However, as the manufacturing sector weakened there was less freight to be transported. Reduced auto sales also negatively impacted transportation tonnage as manufacturers moved to limit production and therefore the need for the transportation of parts. The monthly tonnage reports suggest continued volatility and softness in freight volumes, despite the month-to-month and year-over-year gains. Almost every monthly increase in the seasonally adjusted tonnage index was followed by a decrease the following month. Truck and tractor sales fell as carriers expressed hesitancy in increasing fleet size in light of the reduced freight capacity, although at years end there was some slight increase in

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orders. At least the beginning months of 2008 are expected to be exceptionally difficult, with high fuel prices and continued soft freight volume. On a more positive note, while certain aspects of the economy have sputtered there have been enough increases in other sectors to allow for continued hope that the

coming year will ultimately prove economically sound. Consumers have pulled back, but not stopped, spending. There were a number of trucking bankruptcies in 2007, however, some carriers wisely reduced their fleets and operations in an effort to alleviate the financial strain of the current economy. Some economic analysts predict that more small fleets will close, and there will be more consolidations, which may allow the remaining carriers to maintain or increase their operations.

Politics, as always, plays its own role in shaking up the economy and impacting the transportation industry. With a new Democratic Congress and a lame duck President, battle grounds were drawn early. Chairmanship of the House Transportation and Infrastructure Committee went to the Democrats. DOT Secretary Mary Peters went on record that she hoped to reduce the involvement of the DOT in funding transportation projects while at the same time setting standards for interstate highways. The DOT and Congress continue to clash over the Mexican border pilot operations.

Highway privatization, congestion pricing and increased tolls have been pushed by the DOT while Democrats fought for increased fuel taxes, neither of which can really help the economic bottom line of most truckers. The collapse of the I35W Bridge in Minneapolis focused public and political attention on growing problems with an aging infrastructure. The expenses to modernize and maintain these structures have lead to more division over who will bear the cost for those necessary steps. The highway bill that determines where the money comes from and where it will go will be up for reauthorization this year and a contentious battle is expected. States have begun suggesting their own plans for finding monies to fix growing problems, with New

York City's proposal for congestion pricing leading the way.

Fuel, both its cost and efficiency, remain critical issues for truckers and politicians. Congress attempted to pass broad legislation to raise taxes for oil companies and promote renewable energy. While unsuccessful in that endeavor, the new legislation does require cars and light trucks to reach an average 35 miles per gallon by 2013, which is important as forecasts by some indicate that the number of vehicles on the road will grow to 1.1 billion in the next 15 years. It also contained the authorization for a study on truck fuel economy, which is hoped to be used to launch national standards for heavy duty truck fuel economy. Fuel costs, which account for a serious percentage of any trucker's operation, have reached new heights. Diesel prices peaked at the end of November; at a highest ever record of \$3.444 per gallon. According to ATA estimates, the trucking industry burns 730 million gallons of fuel per week. While the Department of Energy has indicated that diesel prices at the end of 2008 are projected to be at \$3.08 per gallon, lower than the high of 2006, it bears noting that this is already an increase over prior projections for the year. Efforts are also focused on reducing emissions as part of the overall effort to reduce greenhouse gases as states sought to obtain the authority to regulate gas emissions. More than a dozen states had requested relief from the EPA, which has now denied California's request to regulate the emissions. The states have vowed to continue the fight.

Despite efforts to fight the implantation of a plan for the single source for government shipments, known as the Defense Transportation Coordination Initiative (DTCI), the GOA rejected the last remaining protest and awarded Menlo Worldwide Government Services, LLC the coveted fixed price logistics contract with the U.S. Department of Defense, which is valued at \$525 million for the base period of the contract. If all option periods are executed, the value of the contract could exceed \$1.6 billion. Menlo provides shipment planning and transportation management and execution for the defense department in the continental U.S., which is essentially the largest shipper in the country. Certain categories of freight will be excluded from DTCI, such as sensitive and/or classified shipments, arms, ammunition and explosives, bulk and missile fuels, household goods and privately owned vehicles.

Tort reform continues to make some small headway for truckers and insurers. The American Tort Reform

Foundation has issued its 2007 report, adding Clark County, Nevada and Atlantic County, New Jersey to their list of judicial hellholes. They join South Florida, the Rio Grande Valley and Gulf Coast of Texas, Cook County, Illinois and West Virginia to round out the top group of most unfair civil court jurisdictions. On a positive note, the Supreme Court ruled that a punitive damage award can not be based upon perceived harm to others who are not a party to the law suit, a decision which will benefit truckers. With a Democratic majority in Congress, federal changes to tort reform are not expected and there has been some indication that states are trying to reverse some reforms which were put into place, not always with success. At year's end the Ohio Supreme Court upheld its state statute limiting tort recovery in certain circumstances.

The "2007 Update on U.S. Tort Costs Trends" released by Towers Perrin indicates that tort costs have actually decreased by 5.5%, the first decrease since 1997 and the largest decrease in 56 years. The tort system cost approximately \$247 billion in 2006, or \$825 per person, which was \$7 less than in 2005. Unfortunately, they forecast that the trend will not continue in the same direction in the coming year, with tort costs expected to increase. The Fulbright Litigation Trends survey found that overall corporate litigation has diminished. In an interesting trend, the report indicated that 56% of companies surveyed tried to settle cases before trial, with smaller companies less willing to settle than mid-cap or billion-dollar firms. The energy industry saw the highest overall settlement rates (80%), followed by engineering, health care and insurers. Companies based in the Midwest settled more often than those in other parts of the country.

Continuing the tradition of ending this section of the resumé with the latest news on the Mexican/U.S. border operations, we once again note that the border is still not open. While the FMCSA did commence its proposed pilot program for 100 carriers, it faced political and legal challenges throughout the year as efforts were made to stop the program. At year's end Congress' final spending package, signed by President Bush, removed any funding for the program. While the FMCSA has acknowledged that in accordance with the spending bill it will not implement any new program, it has indicated that it intends to continue with the existing pilot program citing an ambiguity in the legislation. Various organizations and congressional members have expressed their dismay at the FMCSA's interpretation of the spending bill as they sought to terminate even the existing pilot program and now contend that the FMCSA is in violation of the law. This will remain a fight in the coming year. There have been rumors the Mexican government is considering

blocking U.S. exports of certain products if the pilot program ends. On the other side of the country, despite much opposition, the U.S. Department of Agriculture implemented its inspection fees for carriers entering the country from Canada. The Canadian government continues to seek removal of the fees and has proposed alternatives to the fees. On the plus side, surface transportation between the United States Canada and Mexico continues to rise 5.5 percent higher in September 2007 than in September 2006, reaching \$66.8 billion, according to the Bureau of Transportation Statistics.

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Government Activity

Although there are many government agencies which issue regulations which impact the transportation industry, the FMCSA continues, by far, to have the greatest impact on the trucking industry. This year the FMCSA faced harsh criticism for its delay in moving forward on its long term plans to improve truck safety and for extended delays in addressing other long awaited rulemaking.

The most pivotal of issues this year, as it has been for many years, was the hours of service under which a driver may operate. At the end of 2006 it was thought that the new rules were squarely in place and that the FMCSA's attention could finally turn to other issues. However, early in the year a Federal Court determined that the FMCSA had failed to comply with its regulatory obligations and invalidated the rules. The Court held that the FMCSA had failed to determine the affect of the new hours on driver fatigue. That led first to a flurry of activity to determine whether trucking would be forced to return to the old rules while this issue was addressed. It was argued that return to the old rules would simply create more confusion as drivers had already begun the changes necessary to comply with the new rules. The FMCSA was granted a stay and permitted to retain the new rules while it evaluated its statutory obligations. At year's end the FMCSA issued its interim final rule, upholding the existing HOS which contain the 11 hour driving limit. The FMCSA determined that providing that 11th hour for operation has not resulted in increased accidents, citing new data that in 2006 the fatality rate per 100 million vehicle miles traveled was 1.94 – the lowest rate ever recorded. In addition, since 2003, the percentage of large trucks involved in fatigue-related fatal crashes in the 11th hour of driving has remained below the average of the years 1991-2002. Between 2003, when the 11-hour driving limit and the 34-hour restart were adopted, and

2006, the percent of fatigue-related large truck crashes relative to all fatal large truck crashes has remained consistent. In last year's resume we reported on the court filing by various organizations to reject the rules and this year we conclude with the almost the same statement. Consumer groups and unions have moved to vacate this interim final rule which means that the FMCSA will have to continue its focus on concluding these rules in the coming year.

The electronic on board recorder regulations are still pending. Early in the year a rulemaking was proposed which would require certain carriers with a history of existing hours of service violations to install electronic on board recorders. Although the FMCSA held listening sessions to address the impact of the proposed rulemaking, no final rules have been forthcoming. The FMCSA has indicated that it will publish a final rule in the coming year and that it intends to expand the requirement for use of the recorder to a greater number of carriers.

Proposed rulemaking concerning the obligations of intermodal equipment providers is also at a standstill. The FMCSA issued its proposed rulemaking which would require providers to file an MCS-150C. The regulations are intended to reduce the current exposure that truckers face while using potentially unsafe equipment on public roadways and require more inspections by equipment owners. Comments on the proposed rulemaking ended mid-year but there has been no further notices issued by the FMCSA. Rail and ocean carriers opposed the new rulemaking and so it is unclear where the FMCSA will stand after their comments.

Last year we reported that the FMCSA had accepted petitions to address whether the MCS-90 endorsement extended protection to accidents outside the U.S. and whether Canadian insurers could make filings. While the petition was accepted and various comments filed the FMCSA has taken no action on the petition.

The regulation of household goods transportation brokers is also pending. The FMCSA has proposed to further regulate these operations and has suggested civil penalties for unlawful estimating practices and increased penalties for providing services through unauthorized carriers. The proposed new stopping distance for trucks was similarly pushed to the back burner. The rules, which were to cut the allowable distance by 30% was supposed to have been published in 2007. Finally the GAO issued a report rebuking the FMCSA for its failure to issue fines for serious safety violators

although it did acknowledge that the FMCSA was making headway in targeting high risk carriers. The FMCSA has made a push toward increasing compliance reviews as a way to reduce accidents.

The FMCSA's Safestat program continued under fire this year, although its prognosis is better than in years past. A preliminary study of 15 states found that only 64% of non-fatal truck crashes were reported. The FMCSA continues evaluating steps to create a better data gathering program to insure proper reporting of accidents, both fatal and non-fatal. The most recent GAO report indicates that the system is better than before, but still needs substantial improvement to permit proper analysis of a carrier's safety

The FMCSA is also still moving toward completing rules for new driver entrants. At year's end it issued its revised standards for mandatory training for entry level operators. Minimum classroom time and behind the wheel training from accredited programs will be required, if the proposed rules are ultimately enacted

As noted, there are other governmental agencies which impact trucking. The FDA issued its Food Protection Plan which is designed to address the many issues raised by the problems with adulteration and contamination of food this year. For truckers, the FDA has requested the authority to require measures to protect against the intentional adulteration of food, such as requiring locks on tanker trucks transporting food. At the current time seals and locks are not mandatory.

Of some great satisfaction to the insurance industry which actively pursued these changes, the U.S. Sentencing Commission has proposed various sentencing guidelines for cargo theft. The new guidelines will impose different levels of penalties for cargo theft, which remains a critical concern to insurers, shippers and truckers. Each year finds new and cleverer ways to steal the cargo moving through our country.

The Corridors of the Future program, one element of the DOT's six-point National Strategy to Reduce Congestion on America's Transportation Network has created its own set of issues as it also takes over monies designated for evaluating parking options for truckers. The scarcity of safe parking has been a problem for truckers for a number of years. As the overall national congestion initiative is focused on reducing traffic on highways, relieving freight

bottlenecks, and reducing flight delays, through privatization, tolls and designated truck roads, the issue of parking has apparently been moved to the side in the Federal Highway Administration agenda. The lack of parking should be a concern to insurers, as trailers left in unmanned parking facilities bear a great risk of theft.

After a year of confusion over the existence of the Uniform Carrier Registration program, it has finally gone into effect. There was so much confusion that at one point during the year Single State Registration was reactivated for a short period of time in case the UCR was not completed. The new UCR collects fees from for hire carriers, as well as private fleets, truck renting and leasing firms, and truck brokers, creating a broader range of fee collections. Although the system is in place, not all states have joined the program and in 2008 we will see which states are able to get the system up and running. At the end of 2007 34 states had indicated that they would utilize the system in the coming year.

Cargo security remains a critical government concern. President Bush signed into law various recommendations from the 9/11 committee which address the security of cargo entering the country. The legislation imposes a July 2012 deadline for all foreign cargo containers shipped to the United States (except U.S. and foreign military cargo) to be scanned by non-intrusive imaging equipment and radiation detection equipment at the foreign port before being loaded on a U.S.-bound vessel. While a needed security precaution it is expected to raise the cost of importing goods.

The Motor Carrier Industry

We can start with some encouraging reports. The U.S. Census reports that commercial trucks traveled 91 billion miles in 2006, a number equal to nearly 200,000 round trips to the moon. Revenues were \$220 billion, of which \$204 billion was from long-distance trucking. 96% of the revenue was from transportation solely within the U.S. borders. The largest dollar volume of truck shipments were new furniture and miscellaneous manufactured products, agricultural and fish products, base metal and machinery, and wood products, textiles and leathers.

The report also contained a number of results which insurers should consider in evaluating where to market business. For example, couriers and messengers revenue was \$72 billion in 2006 and warehousing and storage totaled \$21 billion. Approximately 84 percent of trucks and trailers were owned and/or leased with

drivers, while 16 percent were leased without drivers. General freight trucking, which handles commodities transported on pallets in a container or van trailer, contributed two-thirds of all trucking revenue with \$147 billion. Trucks transporting specialized freight — requiring equipment such as flatbeds, tankers or refrigerated trailers because of the size, weight or shape of the commodity — accounted for the remainder of trucking revenue at \$73 billion. Local general freight trucking revenues, which come from carrying goods within a single metropolitan area and its adjacent non urban area, grew 12.3 percent to \$25 billion. Long-distance general freight revenues, which come from carrying goods between metropolitan areas, increased 4.3 percent to \$122 billion.

The ATRI study on trucking indicated that hours of service and driver turnover were the top two concerns in the industry in 2007. Driver turnover continues to be a problem for the trucking industry and 2007 saw carriers focusing on ways to keep drivers in their stable of employees. ATA statistics indicate that turnover rates at large truckload carriers continue to exceed 100%. In at least one study, research concluded that long and irregular weekly work hours, little predictability on time at home, and the stresses of operating a big rig are the leading cause of high turnover. The research also showed a big spike in turnover after training was complete and again at the end of the first year, when drivers generally have no further obligation to the company. Of 1,069 new drivers studied, only 39 percent remained on the job, while 15 percent were discharged and 46 percent voluntarily quit. A number of companies have reported implementing driver incentives, better vehicles, pay raises and wellness programs in an effort to keep good drivers. Fuel costs, congestion, government regulations, tolls, tort reform, driver training, environmental issues and on board recorders rounded out the top ten list of industry concerns.

Rate bureaus, which have been part of the transportation industry for years, have allowed carriers to collectively establish rates for transportation. For many years these rate bureaus had the benefit of antitrust immunity. The Surface Transportation Board ended that exemption finding that the continued exemption was reducing competition.

The trucking industry has also been impacted by identity fraud issues. There has been a rise in reported losses arising from cargo thefts caused by imposters stealing the identity of trucking companies. In addition, earlier in the year various companies reported receiving false requests from the DOT for release of

financial information.

Some major union contracts came up for renegotiation this year. In an unprecedented step, UPS withdrew from the Teamsters pension fund after payment of a large penalty to the fund. Other carriers are expected to seek negotiation of their right to withdraw. The National Master Freight Agreement is up for renewal in March and efforts are underway to negotiate a contract and avoid labor unrest.

The trucking industry continues to look for ways to change its operations. A number of large carriers have entered into the international market, opening operations in China and other Asian countries in order to expand its control of the logistics of international freight.

Truck accidents are a major factor in the economics of a carrier. The FMCSA reports that a motor carrier must generate an additional \$1,250,000 in revenue to pay the cost of a \$25,000 accident, assuming an average profit of 2%. The government data states that in 2006 there were 368,000 accidents, of which 287,000 involved only property damage, with 77,000 involving injury and 4,321 fatal injuries. There were 331 fatal bus injuries. The 10 States with the most fatalities from large truck crashes in 2006 were (in descending order): Texas, California, Florida, Georgia, Pennsylvania, New York, Illinois, Ohio, Missouri, and North Carolina. Overall the numbers are better than the prior year. The Commercial Vehicle Safety Alliance Road check also reflected some improvements in driver operations. While there were a higher number of hours of service violations at least some portion of those violations can be attributed to the confusion over the changes with the rules.

Insurance Underwriting

The fourth consecutive year of double-digit returns on capital is a welcome sight to the insurance industry and the financial market. With so many financial services impacted by the mortgage and real estate market at least insurance has helped keep up the overall numbers. Fitch Ratings reports that strong underwriting performance, together with a limited catastrophe season and good loss reserves have helped create this success. In late 2006 and early 2007 the predictions for the year were not as high, as cat modeling indicated higher losses and the overall market appeared to be softening at a quicker pace.

ISO and Property Casualty Insurers Association of America report that the combined ratio — a key measure of losses and other underwriting expenses per dollar of premium — went to 93.8 percent in the first three quarters of 2007 up from 91.5 percent for the same period in 2006. It is still the second best ratio for the first nine months of any year since 1986. Net written premiums were \$337.6 billion for 2007, basically unchanged from 2006, with written premium growth dropping to zero percent. Net loss and loss adjustment expenses (after reinsurance recoveries) increased \$7.3 billion, or 3.4 percent, to \$219.6 billion for these quarters. Excluding catastrophe losses, ISO estimates that net loss and loss adjustment expenses increased \$12.5 billion, or 6.2 percent, to \$214.5 billion in the first nine months of 2007.

The cyclical nature of the insurance industry, confirmed by its historical trends, indicates that a downturn is to be expected, as the positive returns will generally not last long. The market continues to soften. Some reports indicate that there will be a decline in operating profitability and return below required levels. Market surveys indicate that there was an average 13.3% decline in market price during the third quarter of 2007, the largest decrease in 14 quarters. Market Scout reported that commercial property/casualty rates dropped an average of 16% in December, 2006.

The Terrorism Risk Insurance Act was extended to 2014 and appears to be the only relevant regulation to actually make its way through the government maze. The Nonadmitted and Reinsurance Act, designed to create uniform regulations for surplus lines insurance companies and reinsures is being negotiated and lobbied by the interested parties. In light of the public outcry following the uninsured losses after Hurricane Katrina, legislation has been proposed which would repeal the limited antitrust exemption for insurers and give the Department of Justice and the Federal Trade Commission the authority to apply the antitrust laws to insurance companies.

The transportation insurance industry has a unique place in the overall insurance market. Trucking is one of the few insurance markets which have such a niche market and in fact has insurers whose sole business is writing various forms of trucking insurance. Entire businesses, including our own, are devoted to assisting insurers in analyzing the risk and understanding the nature of the insured's operations. Truckers look to the insurers to offer safety information and insights into their operations which they do not otherwise have. When questioned on what they look for in an

insurer, many truckers look for the an insurer which has showed its staying power in the transportation insurance field as well as their use of underwriters and claims adjusters who are familiar with the intricacies of trucking and can wind their way through the myriad of red tape and regulations. This should remind insurers that it is important to maintain a staff of qualified underwriters and claims staff and to utilize the unique knowledge available from CAB to make your book of business the best it can be.

Central Analysis Bureau

Among the biggest challenges facing insurance underwriters today is managing information. More information is available now than ever before, yet the amount of time needed to collect, maintain and analyze this information can be overwhelming, significantly increasing the burdens on an underwriter and reducing efficiency. For nearly 70 years, Central Analysis Bureau, Inc. has been there for the motor carrier insurance industry, serving as the underwriter's one stop source for information. With the launch of CAB's "**Know Your Insured**" program several years ago, CAB now provides superior analysis and management reports and tools that allow underwriters, managers and claims personnel to view information about their insureds in a way never before available. Our **Submission Report** which was introduced last year is quickly becoming a staple to underwriters of subscribing insurance companies. Also included in this program is CAB's **Financial Analysis Report** which includes critical information regarding the financial condition of motor carriers, as well as our own proprietary CAB Rating system — one which has been a recognized standard within the industry since 1939 and a proven indicator of safety and financial performance. In conjunction with its **Insurance Filing Monitoring Program** and **Safety Monitoring Program**, CAB's "**Know Your Insured**" program will effectively allow underwriters to make better underwriting decisions and minimize an insurance company's exposure and liability under regulatory filings.

In place of the separate databases and sources available on the USDOT's SAFER, SafeStat and the FMCSA's L&I websites, CAB has aggregated all available information raw information, both public and proprietary, into a single unified database. Having all this information in a single location provides CAB with the opportunity to perform its analysis based on the most complete snapshot of all available data. Cross-

referencing of the data allows conflicting and inaccurate information to be filtered out. Issues that might otherwise have been overlooked are now caught by CAB's systems and highlighted for the underwriter to review. Because too much information can be confusing, maximum effort has been made into the assembly and presentation of this information to create intuitive and easy to use report formats.

Recognizing the need for education, CAB provides full service along with its products. Our trained analysts are available to help underwriters understand the reports and ratings provided by CAB. Web based demonstrations are available upon request and can be performed on a one-to-one basis, or broadcast to up to 15 people in 15 different locations simultaneously. We would also be pleased to provide a demonstration of our products to any interested party not currently subscribed to our services.

In response to the successful class last year at the seminar jointly hosted by the law firm of Schindel, Farman, Lipsius, Gardner & Rabinovich and Central Analysis Bureau, Inc. regarding the understanding and use of available information, we are proud to announce that there will once again be a session at this year's seminar to introduce participants to the frequently underutilized yet accessible tools which can enable underwriters to more effectively underwrite motor carriers and vastly improve their results, as well as provide advanced information for more in depth investigation during the claim process.

Many insurance companies are already reaping the benefits of subscribing to all of our products. For those of you not familiar with all of our products, space only allows a short introduction, so we encourage you to contact Shuie Yankelewitz at 212-244-6575 x225 or syankelewitz@cabfinancial.com for more in-depth information.

Safety Monitoring Program. Beginning with the initial application, throughout the term of the policy, and at the point of the policy renewal, **CAB's Safety Monitoring Program** will help you research and track all potential and current risks. Information collected by the USDOT at weigh stations and roadside inspections, accident reports, audits and other government operations are collected and assembled by CAB's systems. Upon submission of an application from any motor carrier, our **Submission Report** is available. This report is unparalleled with regard to the information displayed, including financial and safety ratings, operating authority, insurance information,

out-of-service statistics, reported power units, trailers and drivers and states where inspections have taken place, as well as a list of individual VIN numbers of vehicles inspected and all associated violations. Warnings are prominently displayed on the front of the report to alert the underwriter to any issues of concern with regard to the carrier. With this report in hand, an underwriter need look no further. Because underwriting should not end with the issuing of a policy, CAB will continue to monitor the insured with our **Baseline Report** followed by our weekly management **Update Reports**, which highlight any significant changes in a carrier's safety performance. At the time of renewal, generally 90-120 days before the termination of the policy, a **Renewal Report** is distributed with all the most recent information so the underwriter will have the information readily available.

Insurance Filing Monitoring Program. Insurers are routinely faced with unanticipated exposures because U.S. Department of Transportation filings have not been cancelled, filings are made with greater limits than required or filings are made for carriers that did not even require filings. Improper filings are a ticking time bomb for any insurer. Every day that any incorrect filing remains in place, you increase your risk and potentially affect your bottom line. CAB is the only company to offer the management tools that would allow for a company to eliminate problematic filings, as well as real-time tracking of all new filings the month they are issued. On a monthly basis, we scan through all the outstanding filings that an insurance company has registered with the FMCSA. Each individual filings is analyzed to determine whether or not it falls under any of the following categories: Filings with effective dates 5 years old or older; filings on behalf of carriers whose authority has either been revoked or never granted; filings utilizing a form that results in an effective filings with no dollar limit; filings for amounts in excess of the FMCSA required limit; unnecessary cargo filings on behalf of contract carriers; filings for brokers (a broker does not require a filing); filings on behalf of Mexican carriers (filings not required for Mexican carriers). We then send subscribers a report which lists all of these potentially problematic filings, and a spreadsheet with all outstanding filings for the subscriber's insurance companies. This report also has a special section dedicated to a "real time" analysis of all new filings, allowing an insurance company to fix errors quickly and to trace how these mistakes occurred. Since an insurance company's liability under a filing can range from \$10,000 per accident for a cargo filing to as much as \$5,000,000 for a BIPD filing, avoiding even one payout from an unnecessary filing or limit will pay for the cost of this program for many years.

The **Financial Analysis** service: The original and still essential way in which CAB has helped underwriters to know their insureds. For almost 70 years CAB has been performing financial analysis and providing ratings on motor carriers. Our analysis is designed specifically for motor carriers and the concerns of insurance companies. No other source can provide this type of specific and targeted analysis. In addition to the direct financial responsibility insurance companies assume under their regulatory filings, financial condition has been shown to be directly correlated with safety performance. The motor carrier industry continues to be volatile, with the FMCSA issuing over 50,000 new docket numbers each year and a similar number of motor carriers ceasing to exist. Subscribers can submit financials to be rated, or use our website to look up ratings and information already in CAB's database.

As noted in this resumé and in our **Bits & Pieces** during the year, the motor carrier industry in 2007 faced strains from increasing costs and slowing freight volumes, resulting in an increase in bankruptcies. These trends are expected to continue and possibly even worsen in 2008. The breakdown of rating included with this resumé shows that while the number of companies rated SATISFACTORY or FAIR has increased, so has the number of carriers rated POOR and UNSATISFACTORY. This indicates that the motor carrier industry is becoming increasingly divided into companies that are strong financial and those that are weak, with a reduction in those just "getting by". All this makes it even more important for underwriters to keep a close watch on the financial condition of their insureds and prospective insureds. In these volatile times financial condition can change, for the better or worse, very quickly so it is important that decisions be based upon current financial condition.

We continue to be gratified by all the positive comments we receive about our monthly e-mail newsletter, "**Bits & Pieces**". We all get way too many e-mails in our inbox but this is one that we have been told many await every month and find to be a "must read". This newsletter, which is sent free of charge to all subscribers, keeps you abreast of the news of the month in transportation and insurance, provides a heads-up on regulatory activities and provides information on the latest court battles over issues which affect your exposure. As the government issues or changes rules and as the various courts of the land opine this newsletter gives underwriters the information to keep policies up to date. If you do not currently receive this newsletter, but would like to,

please e-mail Mark Schweber at mschweber@cabfinancial.com.

In 2008 we will continue to seek out new information to help underwriters to know their insured and work to provide this information in the most effective manner possible. We will also continue to solicit feedback and to incorporate that feedback into our products.

The entire staff of CAB wishes you the best for the coming year. Please do not hesitate to contact us with any questions regarding specific motor carriers, the industry in general, regulatory issues or coverage questions. There is always someone here to help you.

We would be pleased to furnish you with additional copies of this resumé upon request. It is also available on our web site.



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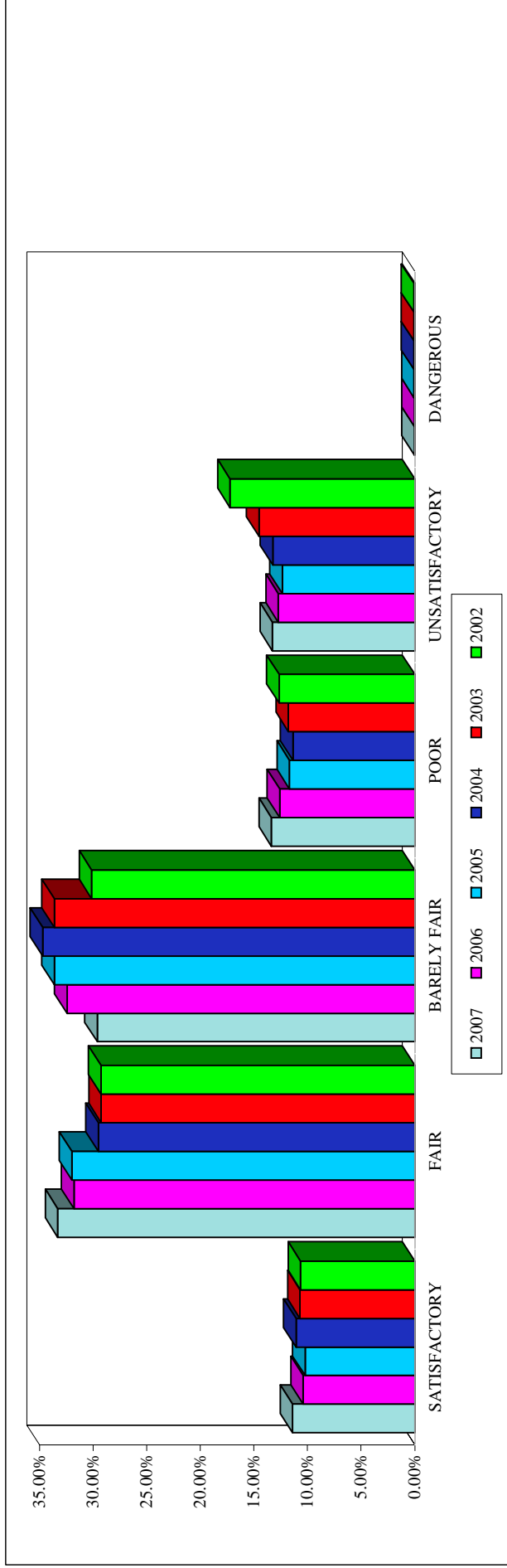
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Ratings

Breakdown of ratings for the year 2007 and prior:

	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997
SATISFACTORY	11.39%	10.40%	10.24%	11.08%	10.69%	10.64%	12.77%	14.81%	15.63%	16.11%	15.65%
FAIR	33.31%	31.80%	32.00%	29.52%	29.26%	29.28%	30.54%	31.70%	31.98%	30.77%	30.70%
BARELY FAIR	29.61%	32.45%	33.64%	34.71%	33.63%	30.14%	29.96%	29.57%	28.94%	28.49%	27.53%
POOR	13.37%	12.59%	11.69%	11.38%	11.79%	12.64%	11.71%	10.54%	10.90%	11.42%	12.04%
UNSATISFACTORY	13.27%	12.72%	12.34%	13.23%	14.53%	17.23%	14.95%	13.30%	12.49%	13.15%	13.97%
DANGEROUS	0.02%	0.02%	0.06%	0.08%	0.07%	0.07%	0.07%	0.08%	0.06%	0.06%	0.08%



Reference to CAB ratings

- SATISFACTORY
- FAIR
- BARELY FAIR
- POOR
- UNSATISFACTORY
- DANGEROUS
- Excellent financial condition
- Adequate financial condition
- Limited financial condition
- Weak financial condition
- Inadequate financial condition
- Distressed financial condition

Our firm is pleased to present our annual summary of legal decisions that we feel are of interest to our clients and friends.

FEDERAL LAW

The D.C. Circuit Court sent the USDOT back to the drawing board to rethink its methodology for preventing driver fatigue in *Owner-Operator Independent Drivers Assoc., Inc., v. Federal Motor Carrier Safety Administration*, 494 F.3d 188. The FMCSA, and before it the I.C.C., have long regulated the hours of service (HOS) of commercial motor vehicle operators. The regulation contains a daily driving limit, a daily “on duty” limit, a daily off-duty requirement, a sleeper-berth exception and a weekly on-duty limit. Congress had directed the Department in 1995 to update the regulations based on current scientific and other research to help reduce fatigue-related collisions. A 2003 rulemaking was vacated in a 2004 decision by the D.C. Circuit, and the FMCSA promulgated a new set of rules in August, 2005.

In fact, as the D.C. Circuit noted, the 2005 rules were, with one exception, identical to the 2003 rules. The FMCSA told the Court that it had considered the various issues that the D.C. Circuit had objected to in its 2004 decision, and had also relied on a new cost-benefit analysis. Using the cost-benefit analysis, the FMCSA concluded that it would not modify two provisions the D.C. Circuit had vacated in 2004, which permit drivers to drive 11 hours per day, and to “reset their clocks” after any 34 hour period off-duty. These two provisions in particular were challenged by Public Citizen, a consumer advocacy organization that was also the plaintiff in the 2004 decision.

In its recent decision the court concluded that FMCSA had failed to comply with the notice and comment requirements for rulemaking under federal law. Public Citizen, in the court’s view, would have been able to mount a viable challenge to the methodology used had it been given an opportunity to do so. The Court ordered the USDOT to start over. At the same time a challenge to the regulations mounted by OOIDA, a driver’s association, was rejected by the court.

In *Craft v. Graebel-Oklahoma Movers, Inc.*, ____ P. 3d ____ the Oklahoma Supreme Court found no conflict between the safety provisions of the Federal Motor Carrier Act and the exclusive remedy provisions of the Oklahoma Workers’ Compensation Act. Dianna Craft was employed by Propack, Inc., a “manpower” company which leased employees and equipment to Graebel, a federally authorized carrier. She and other Propack employees had completed a packing job for Graebel and were being driven back toward their homes in a Propack van which was struck by another vehicle. Craft argued that her injuries were exacerbated by the absence of working seat belts in violation of federal safety law. Graebel had the authority by virtue of the contract to insist that Propack comply with the safety rules. Craft produced evidence that the

RECENT DEVELOPMENTS IN TRANSPORTATION AND INSURANCE LAW

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vans used to transport employees were poorly maintained and that inspection and maintenance services to be provided by Central City Mobile Service were negligently performed. However, Graebel sought and won summary judgment at trial and at the first layer of appeal on the grounds that as Craft’s principal employer it was protected from suit, while Central City successfully moved

for judgment on the basis that plaintiff knew prior to the loss that the seatbelt was broken.

The Supreme Court of Oklahoma reversed the award of summary judgment, albeit only in part, and remanded the matter to the trial court. The court rejected Craft’s reliance upon the Federal Motor Vehicle Safety Act (49 U.S.C. Chapter 301) since that legislation was directed at manufacturers, not carriers. Craft had also looked to a portion of the motor carrier act (49 U.S.C. §31101-31162) which prescribes minimum standards for commercial motor vehicles: as the lessee of the van, Graebel was obligated to make sure the van complied with the safety regulations. The court, though, found no evidence that the express preemption set out in the federal regulations was directed at any Oklahoma statute.

And, while implied preemption was theoretically possible (the court of appeals was wrong when it held that the existence of express preemption language precluded the possibility of implied preemption), there was no implied preemption either since it was clearly possible to comply with both the Motor Carrier Act and the Oklahoma worker’s compensation laws. Accordingly the court affirmed key portions of the court of appeals’ decision. However, the Supreme Court found that Craft had set out a claim for intentional tort which would fall outside the workers’ compensation bar. Thus the matter was remanded for the trial court to examine that issue. The court also found that Central City had an independent duty as an inspector under the Motor Carrier Act which mandated that it truthfully report on the condition of the inspected vans. Accordingly, the grant of summary judgment was premature.

In *Dupuis v. Vanguard Car Rental USA, Inc.*, 510 F. Supp. 2d 980 (M.D. Fla.) the federal court concluded that the Graves Amendment preempted Florida’s dangerous instrumentality doctrine. Florida has long provided by statute that owners of motor vehicles, including lessors, are strictly liable for the negligent use of their vehicles by others. However, as we have discussed in recent years, the Graves Amendment, which forms part of the 2005 SAFETEA legislation, specifically mandates that the owner of a motor vehicle that rents or leases that vehicle to someone else shall not be liable for the negligence of a lessee or rentee so long as the owner is in the business of leasing or renting vehicles and there was no negligence nor criminal wrongdoing on the part of the owner. The court here found clear conflict between the Florida doctrine and the federal statute.

The District Court in *Brown v. Truck Connections Int., Inc.*, ___ F. Supp. 2d ___ (E.D. Ark.) considered whether Penske Truck Leasing, which has interstate motor carrier authority, could be held liable as a carrier when a different motor carrier was transporting the Penske vehicles which were involved in the loss. This motor carrier was a driveaway company that was driving the two vehicles, on Penske's behalf, from one location to another. Two Penske vehicles, each bearing a Penske placard, were operating on I-40 in Arkansas. The decedent's estate claimed that one of the trucks changed lanes without warning, forcing her off the road. As she tried to get back on the road she collided with the second Penske truck and then crossed the median and was struck and killed by an oncoming tractor-trailer rig.

The estate sued Penske and the motor carrier (TCI) which was transporting the Penske trucks pursuant to a transportation agreement. TCI hired the two truck drivers who were also named as defendants.

In response to Penske's motion for summary judgment, the estate claimed that Penske was liable as a motor carrier under both state and federal law. The court first rejected the estate's arguments under state law. There was no evidence that Penske had the right to control the specific conduct of TCI or its employees, nor, since operating a truck is not considered a dangerous activity, did Penske have a non-delegable duty to the public under Restatement (Second) of Torts §428.

The estate also made claims under federal law, the first of which was that under 49 C.F.R. §390.5 TCI was a statutory employee of Penske. The regulation defines an employee as "any individual...who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle..." The court noted that the purpose of the provision is to eliminate the distinction between employers and independent contractors.

The court found that §390.5 did not create liability for Penske. The two drivers were hired by TCI, not by Penske, so they could not be Penske's statutory employees. Moreover, while TCI could be a "person" as that term is used in the regulation, it could not be an individual, the term used in §390.5, and therefore, TCI was, not Penske's statutory employee.

Finally the court turned to the claim that Penske was liable on the basis of "logo liability." The court expressed a great deal of skepticism about the proposition that liability should be assigned purely based on the presence of placards. The facts in this case were a bit different than the facts in most cases in which placards become an issue; the court seems to have understood that, although some careless language (pronoun reference is a problem) makes us wonder how accurate the court's understanding was or whether this part of the decision will be misunderstood. ("Traditionally, the logo liability doctrine has applied to situations where a lease agreement provides for one party to operate a truck bearing another

party's logo for its own use and benefit.") The court observed correctly that there was no lease here but, rather, a "Motor Carrier Transportation Agreement," Penske as an owner, not as a carrier, hired TCI to transport its vehicles from one Penske location to another.

The court's formulation, though, set out above, in part, seems to us likely to result in mis-citation in future cases. After all many agreements between motor carriers and owner-operators which should, pursuant to the federal leasing regulations (49 C.F.R. Part 376) be called leases are called something else.

For what it is worth, we do not use the term "logo liability" which we believe should never have been utilized in the case law. A logo, or placard, the term used in the regulations, is among the things required by the federal regulations when a motor carrier uses a vehicle it does not own in its business. So long as the lease is in effect (and the presence of a placard may or may not be evidence of that depending on the language of the lease) the lessee-motor carrier is exposed. This is lease liability, though, not logo liability.

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FEDERAL & STATE FILINGS

Two important decisions rejected a plaintiff's claim that a policy issued to a motor carrier should have had higher limits than the insured actually purchased and that, accordingly, the policy should be reformed to reflect those higher limits.

Canal Insurance Co. v. Barker, 2007 WL3551508(E.D. Va.) (unfortunately the decision has not been officially reported), arose out of a Virginia accident involving a truck owned by J.M. Barker and operated by Justin Colvard. Colvard had completed a delivery in Petersburg, VA, and was en route to North Carolina where he was to pick up cargo to be hauled to Georgia. Canal, which issued a \$100,000 liability policy to Barker, filed a declaratory judgment action seeking judgment that its exposure was limited to \$100,000. The claimants counterclaimed that under both federal and state law, as well as relevant policy language, the limits should be increased to \$750,000.

Barker is described in the decision as a Georgia-based motor carrier. A glance at the USDOT licensing and insurance website indicates that Barker has no federal operating authority.

The claimants made a variety of arguments in support of their claim that the limits should be increased, but the court turned them all down. The decision began with the policy itself which, like most auto policies, contained an "Out of State Insurance" provision. ("If, under the provisions of the motor vehicle financial responsibility law...a non-resident is required to maintain insurance... and such insurance requirements are greater than the insurance provided by the policy, the limits of the company's liability... shall be as set forth in such law...").

The court then turned its attention to the question of whether Virginia law or federal law required the insured to maintain higher limits. Before we summarize that part of the discussion, permit us to observe that the court could have chosen a different path to the same result. The Canal policy speaks of motor vehicle financial responsibility or compulsory insurance or similar law. This ostensibly means that if the insured auto is garaged in a state where the required limits are \$25,000 and purchases a policy in that amount, and then drives into a state where the required limits are \$50,000, the insurer will be obligated to pay up to \$50,000 if the loss occurs in the latter state. There is though, arguably, a significant distinction between a motor vehicle financial responsibility law and a motor carrier statute whose limits are going to be significantly higher. The ISO forms make this distinction explicitly.

Instead, Canal argued that neither Virginia nor the USDOT mandated an increase in limits. It is true that the Virginia statute (VA Code Ann. §46.2-2143(B) and (C)), mandates that interstate carriers (and it was not disputed that Barker was in interstate carrier) maintain insurance equal to that required by federal law. However Canal pointed out – and the court agreed – that Virginia regulates only motor carriers who are registered in that state and who engage in intrastate Virginia commerce. Nothing in the Virginia statute applied to non-resident motor carriers.

If Virginia law did not raise the limits, could the federal requirements raise the limits under the “Out of State Insurance” provisions? As noted earlier, we believe that the words simply do not permit such a construction, but again the parties and the court took a different path. The court had no trouble concluding that Barker was subject to the federal insurance requirements and was obligated to maintain financial security in the amount of \$750,000. However, Barker could have fulfilled this obligation by means other than the purchase of an insurance policy. (The court was referring to the options to self-insure or provide evidence of surety, e.g. the form MCS-82.).

The court significantly noted that the federal financial responsibility laws regulate motor carriers, not insurers. Here the policy was issued in the amount of \$100,000 and no MCS-90 was attached. This made it evident that the policy was not being used to satisfy the federal financial security requirements. Moreover if state law (Georgia) were to trigger the “Out of State Insurance” provision based on federal law than the policy would be worth \$750,000 in every state and the \$100,000 limits indicated on the declarations page would have no applicability. This the court was not willing to countenance.

The claimants’ final argument was that the policy should be reformed to reflect the higher limits on the basis of mutual mistake. This was a clever argument which, if adopted in other cases, could be used to turn the tables on insurers which argue that they were never told that the insured, for instance, operates interstate. Canal argued vigorously that the claimants were not parties to the contract and had no right to demand reformation. The point was, however, not completely clear.

(In other cases it could, presumably, be assigned by the motor carrier). Ultimately, though, the court found that even if a claimant, as third party beneficiary, could demand reformation, Georgia required only limits of \$100,000 and the policy complied with that requirement. Since the federal requirements did not mandate insurance (as opposed to other types of protection) reformation based on federal law was a non-starter.

The second of these decisions was *North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Armwood*, 653 S.E. 2d 392 (N.C.), in which the North Carolina Supreme Court reversed a decision by the trial court, which had been affirmed by the appellate court, reforming a motor carrier’s policy to reflect the state’s mandatory limits.

The underlying loss involved an eight year old boy who was struck by a vehicle after exiting a bus owned and operated by Jimmy Lee Best and insured by Farm Bureau. The bus had been classified by the state as not-for-hire, and was being used to transport families to and from a church function. The claimants alleged, though, that on other occasions fares were charged for the transportation of children and that, accordingly, the state’s requirements for for-hire carriage should attach including the requirement of \$750,000 in liability limits.

Here the owner, who had purchased the vehicle in order to transport church members, had been given the opportunity by Farm Bureau to purchase \$750,000 in coverage. (The decision does not explain just how such an offer was conceived and presented). Instead he purchased coverage with limits of \$50,000/100,000. Farm Bureau, in any event, argued – much as Canal did in the *Barker* case – that securing the appropriate limits was the responsibility of the insured and if it had failed to do so the insurer must not be penalized by reformation of the limits from \$50,000 to \$750,000.

It was precisely on this point that the trial court and appellate court disagreed with the insurer. In the view of the trial judge and the majority of the appellate panel (decided in January 2007, 638 S.E. 2d 922), the provisions of the North Carolina vehicle registration statute (Section 20-309) must be read into every liability policy issued for a commercial vehicle in North Carolina. Under that section in order to register a commercial vehicle (or to keep a registration in effect), “an owner ...shall have financial responsibility for the operation of the motor vehicle in an amount equal to that required for for-hire carriers transporting nonhazardous property in interstate or foreign commerce in 49 C.F.R. §387.9” (that is \$750,000).

The appellate court noted that with respect to the financial security requirements for non-commercial vehicles set out at §20-279.1, the courts of North Carolina, including the Supreme Court, had consistently held that the minimum limits were written into every auto policy as a matter of law – i.e., an insurer could not successfully argue that it had issued a \$5,000 automobile liability policy. With respect to the basic limits the statute forced its requirement onto every policy, and the

insurer would not be heard to argue that securing the appropriate limits was the responsibility of the insured. The appellate majority saw no reason for a distinction between the basic auto limits of 20-279.1 and the commercial auto limits of 20-309.

The North Carolina personal auto statute Section 20-279.1, which had been part of the 1953 financial responsibility law dealing with individual policies of insurance, namely every policy issued to the owner of a motor vehicle, mandates (under its current formulation) limits of at least \$30,000 per person/\$60,000 per accident. In that context, the courts of North Carolina have correctly held that the statutory requirements are read into every policy. The North Carolina Supreme Court, however, concluded that there was a distinction between the personal auto statute and Section 20-309 dealing with commercial vehicles. The latter statute was enacted in a different bill, the 1957 financial responsibility act, which, by plain language, places the onus on vehicle owners to secure the required amount of insurance coverage. The differing language shows that the legislature did not treat the two types of mandatory insurance in the same way.

The court also pointed out that North Carolina – like the USDOT- permits the owners of commercial autos to satisfy its obligations by aggregating more than one policy. (The *Barker* court utilized a similar but not identical argument). This, again, shows that it is the insured, not the insurer, who has the obligation to secure the appropriate level of insurance. We would add that this also shows that it can not be said with respect to commercial policies that the required limits are automatically read into them, since that would preclude the insured from arranging for multiple coverages.

Another important decision, *Lincoln General Insurance Co. v. Maria de La Luz Garcia*, 501 F. 3d 436 (5th Cir.), considered the applicability of the MCS-90 to an accident that occurred in Mexico. Lincoln General issued a liability policy to Garcia's Tours which applied to losses in the United States, Canada and Puerto Rico. The tour company, though, also maintained a route between Hariston, Texas and Celaya, Mexico. A Garcia bus on that route collided with a passenger car in Monterrey, Mexico which was carrying eight members of a single family, killing two and injuring the other six.

The Lincoln General policy did not apply to the Mexican loss but plaintiffs, Mexican citizens who brought suit in federal court in Texas, argued that the MCS-90B endorsement (the bus MCS-90) had broader geographic scope than the policy and applied to the Mexican collision. The trial court did not agree and the claimants appealed.

The claimants argued that the MCS-90B eliminated all limiting language in the policy including the territorial provisions. They also pointed out that the negligent hiring and entrustment of the vehicle to the driver occurred in the United States. The Fifth Circuit cited the language of the MCS-90B which amends the policy only to the extent necessary to assume compliance with Section 18 of the Bus Regulatory Reform Act of 1982.

The court, unlike the court in *Heron* (discussed below), then took the trouble to examine the act referred to in the endorsement. The language of the act made clear that only transportation of passengers within the United States triggered the financial responsibility requirements of the act.

The Fifth Circuit was not inclined to consider the alternative argument relating to the negligent hiring and entrustment since it was first raised on reconsideration. In any event, the court found that the alleged negligent entrustment and hiring would not have been actionable for the accident which took place in Mexico. Since the policy and endorsement do not apply to Mexican accidents the site of the negligence was irrelevant.

Over the years, as described in these pages, courts have disagreed as to whether the MCS-90 applies when a loss occurs in the course of purely intrastate commerce. That issue was before the Supreme Court of Virginia in *Heron v. Transportation Casualty Ins. Co.*, 650 S.E. 2d 699, which involved ER Transport Services, a Florida-based interstate motor carrier. The driver had been specifically excluded from coverage so TCI's potential exposure was limited to the MCS-90. TCI argued, though, that the MCS-90 was inapplicable because, at the time of the loss, the driver was in the course of preparing for a purely intrastate run.

Nothing the extensive case law on both sides of the issue, the Virginia Supreme Court found that the courts that had previously looked into the issue had thought too hard. The court found it beyond dispute that the ER vehicle was "subject to the financial responsibilities of Section 29 and 30 of the Motor Carrier Act of 1980"; as such the MCS-90 clearly applied. The court claims to have concluded that the accident vehicle was subject to the 1980 act as a matter of stipulated fact. TCI has sought re-argument, denying that the vehicle was subject to the act at the time of the loss. In any event, the court did not explain how, absent a stipulation, one would determine whether an accident vehicle is subject to the act.

In *Carolina Casualty Inc. Co. v. Zinsmaster*, 2007 WL 670937 (N.D. Ind.), which involved a multi-fatality accident, the various claimants alleged that since the Motor Carrier Act requires an insurer which has made a filing to pay \$750,000 "for each final judgment;" that each of the claimants was entitled to recover up to \$750,000, even though Carolina's policy limits were \$1 million. The court, citing to *Hamm v. Canal Ins. Co.*, 10 F. Supp. 2d 529 (M.D.N.C. 1998), rejected the argument. The court pointed out that the claimants had quoted selectively from the statute and ignored language that explicitly provided that the insurer's exposure was limited by the amount set out in the filing. ("The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant." 49 U.S.C. §13906(a)(1).)

In a later decision, 2007 WL 3232461, the court permitted Carolina Insurance Company to pay its \$1 million limits into the court's registry through an interpleader and released Carolina from any further obligation to defend its insured.

The District Court in *Tremble v. Liberty Mutual Ins. Co.*, 2007 WL 1582759 (S.D. Ga.) held that language in the MCS-90 to the effect that “a judgment creditor may maintain an action in any court of competent jurisdiction” did not preclude the possibility of a defendant-insurer removing the case from state to federal court.

A New York federal court in *Ins. Corp. Of NY v. Monroe Bus Corp.*, 491 F. Supp 3d 430, considered the interaction of the reimbursement provision of the MCS-90B (mandating that an insured pay back any payment made solely pursuant to the filing) and the state’s requirement that an insurer decline coverage to its insureds in a prompt manner. The court rejected the insurer’s argument that the federal right to reimbursement preempted the state insurance law. If the insurer had indeed failed to comply with the prompt notice requirement – something to be determined by the finder of fact at trial – then the insurer’s right to collect back may be waived. The insurer pointed out – and here the judge indicated sympathy for its position – that it was pointless to deny coverage since it knew that it needed to pay the judgment based on the filings. The court found that there were various questions of fact-including whether the insured violated its own obligation to provide prompt notice of the loss. The unanswered question is, in any event, of potential interest in any matter in which the insurer seeks reimbursement after paying pursuant to an MCS-90.

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NON-TRUCKING USE

Auto-Owners Insurance Co v. Redland Insurance Co., 2007 WL 3409409 (W.D. Mich.) involved a dispute between two insurers as to the meaning of a non-trucking exclusion. After Redland had declined its tender, Auto-Owners resolved the underlying claim against its insured motor carrier Everhart Trucking, the driver and against the Redland named insured which owned the rig, and then sought recovery from Redland. The evidence, which included deposition transcripts, documents, phone logs and e-mails, was fairly extensive. The court found that the driver had been dispatched to carry a load from Ohio to Grand Rapids, Michigan on the morning of the accident. Unloading was completed at Grand Rapids at about 11p.m. At that point the driver called Everhart. According to his voicemail message he was headed toward East Chicago, IL and was going to look for a place to sleep. Other evidence indicated that Everhart expected the driver to pick up a load in East Chicago the next morning and that a load was waiting for him there. Before he found a place to sleep, the driver dozed off and struck another vehicle killing its occupant.

Auto-Owners sought summary judgment on the theory that the Redland non-trucking exclusion applied only if there was evidence that the carrier had explicitly told the driver that he was being dispatched; Auto-Owners relied on the testimony of the carrier’s principal that he had not used those words. The court found that even were this the legal standard for the applicability of the exclusion, there were sufficient implications in the record that Everhart had indeed used the magic words

The court noted, moreover, that while the Auto-Owners policy was a comprehensive auto liability policy, the Redland non-trucking policy “is of a type known as bobtail insurance” which “is intended to provide insurance when a covered truck is ‘bobtailing’ or ‘deadheading’ “and is not intended to apply” when the truck is engaged in business operations.” The language of the Redland exclusion referred not only to a truck “after dispatch” by a lessee or “under orders” to a lessee but also one being operated “in the business” of a lessee. This latter phrase is to be interpreted flexibly but essentially excludes coverage when the lessee’s commercial interests are being furthered. In this case the driver, far from home, had completed one delivery and was positioning himself to pick up another load the following morning. Even after the delivery he was not on a personal trip; the goal of getting the required hours of sleep was in furtherance of Everhart’s business since by so doing he would have been available to pick up the load the next day.

Larry Rabinovich of our firm is handling the matter, now on appeal to the Sixth Circuit, on behalf of Redland.

One of the recurring issues with respect to non-trucking policies is whether the broad exclusion, which is intended to prevent coverage when the truck is being used to haul property or is otherwise being used to further the business interests of the insured, runs afoul of a state’s financial responsibility statute. To date, as we have discussed in the past, only New York State has so found and, in response, various New York only endorsement have been created which appear to have satisfied the requirements of the relevant statutes.

New Jersey has looked into the matter on several occasions, always concluding that the endorsement it was examining was valid. This was the result, as well, in *Connecticut Indemnity Co. v. Podeszwa*, 392 N.J. Superior 480, 921 A.2d 458 (N.J. App.).

The claimants Richard and Anne Podeszwa, insured under a personal lines policy issued by Rutgers Insurance, were struck, as they rode in their own vehicle, by a tractor owned by one Euclides Anico. Anico had leased his vehicle to Allway Corporation and at the time of the collision it was being driven by Allway’s employee Nelson Perez. Allway had purchased truckers liability coverage from Security Indemnity Insurance Company. Anico had purchased a non-trucking policy from Connecticut Indemnity.

Some months after the accident Security was declared insolvent and the New Jersey Guarantee Association (“PLIGA”) assumed responsibility for Allway’s defense PLIGA insisted that the Podeszwas exhaust their rights under all other available policies including their uninsured motorists coverage with Rutgers. PLIGA also argued that the Connecticut policy applied.

The Connecticut policy excluded coverage when the vehicle was being used in the business of a lessee so long as the rental agreement required the lessee to carry primary insurance. In addition, the policy contained a provision making clear that the

exclusion did not apply unless the lessee's policy was actually in effect. Many of our readers will recognize these coverage provisions as reactions to the New York decisions referred to earlier.

Connecticut filed a separate action against all of the other interested parties seeking a declaration that it had no coverage for the loss. It was not seriously disputed that the vehicle was being used in Allway's business, although the other parties pointed out that while declining to pay the liability claim, Connecticut had paid a property claim.

All of the parties in the declaratory judgment action agreed that absent Security's insolvency, any judgment resulting from the loss would have been the responsibility of Security. The trial court concluded that the insolvency was not significant for purposes of Connecticut's exclusions and agreed with Connecticut that its exclusion applied and that, accordingly, Rutgers' UM coverage was applicable.

The appellate court affirmed. The court first held that Connecticut's trucking exclusion did not violate New Jersey's statutory omnibus clause (N.J.S.A. 39:6B-1a) which mandates that every owner maintain liability coverage for his or her vehicle. Allway's liability coverage with Security (backed up by PLIGA) satisfied the statutory intent of assuring at least some financial protection for injured members of the public.

Rutgers' alternative argument was that the trucking exclusion is contrary to public policy. The appellate court reviewed various decisions in which New Jersey courts have considered the liability of non-trucking policies. In those earlier decisions, the courts have found no need to disqualify the non-trucking policy since there were other coverages available to pay the injured members of the public. Here, the court decided that it was time to face the issue squarely. The court examined the federal regulatory system which requires the motor carrier to maintain insurance. Non-trucking (or bobtail) policies must always exist in tandem with a truckers liability policy. In that context there is little likelihood that an injured member of the public would go uncompensated.

While the decision is reasonably clear in its central holding there are a few points that deserve mention. The court, for instance, mentions the New York line of cases but appears to have fundamentally misunderstood the New York rule. New York's Court of Appeals has indeed concluded that the standard ISO bobtail exclusion invalid even if the injured claimant is able to collect from the lessee's motor carrier. Accordingly, the distinction drawn by the New Jersey court between cases which uphold the trucking exclusion and those which invalidate it is simply inaccurate. We wonder, in any event, how the *Podeszwa* court would have ruled if there were no UM coverage available and no Guaranty Fund back-up. Thus *Podeszwa* may have analyzed the matter in greater detail than did earlier New Jersey cases but we do not think that it has touched all of the bases.

In *Treiber & Straub, Inc. v. United Parcel Service* the Seventh Circuit Court of Appeals dealt with limitation of liability under federal common law. The Carmack Amendment did not apply to the air shipment of jewelry valued at \$100,000. The shipper declared and paid for a valuation of \$50,000, the highest allowed by UPS. The court allowed no recovery, upholding the UPS tariff which provided that UPS would not carry or be liable for packages valued at more than \$50,000. The court held that the carrier had to give reasonable notice of the limitation (as distinguished from "clear and conspicuous" notice required under the Carmack Amendment), and that the carrier does not have to show that the shipper had actual notice of the limitation. The court also held that the UPS disclaimer did not violate the federal "released value doctrine" which requires a carrier to give a shipper reasonable notice of the limitation of liability and a fair opportunity to purchase higher liability. The court, observing that UPS did offer shippers the opportunity to declare values up to \$50,000, held that its policy of refusing to take shipments with higher values was a business decision it was free to make without violating the released value doctrine.

Limitation of liability under the Carmack Amendment was the subject of the opinion of the United States District Court for the District of New Jersey in *Travelers Property and Casualty Co. v. A.D. Transport Express, Inc.* In that case, there was no written transportation contract between the shipper and the carrier, and the bill of lading issued by the carrier contained no limitation of liability and did not incorporate a tariff which contained a limitation of liability. The court, nevertheless, held that the Carmack Amendment requirement for a written agreement to limit liability was satisfied by an extensive course of dealing between the parties in which a document provided by the carrier to the shipper with respect to numerous prior shipments gave notice to the shipper of the carrier's limited liability. The court held that the shipper's payment of prior freight bills ratified an agreement to limit liability.

The A.D. Transport decision may be contrasted with the decision of the United States District Court for the Western District of Kentucky in *Ward v. Passport Transport, LTD.* In that case the bill of lading specifically stated that the liability of the carrier was limited to a specified amount unless the shipper declared a higher value. The shipper left blank the place on the bill of lading to declare a value. The court held that the failure of the shipper to declare a value did not establish her affirmative agreement to accept the limitation. The carrier had to show that the shipper affirmatively agreed to the limitation.

Limitations of liability under state law were dealt with in the opinion of the Second Circuit Court of Appeals in *ABN Amro Verzekerings BV, v. Geologistics Americas, Inc.* The liability of both a freight forwarder and a motor carrier to the insurer of the shipper was upheld. The limitation of the freight forwarder was contained in a written contract between the shipper and

the forwarder and in the invoices from the forwarder to the shipper. The court held that the parties could agree to limit the forwarder's liability for the forwarder's negligent conduct. The forwarder and the motor carrier had agreed that the liability of the motor carrier would be limited in accordance with a "longstanding oral and written umbrella agreement." The court held that this agreement effectively limited the liability of the carrier to the shipper.

The effect of limitations of liability in household good shipments was also a topic of interest. The Eastern District of New York, in *Shapiro v. Prime Moving & Storage*, 2007 WL 2572116 held that despite the fact that one spouse was advised about limitation issues prior to the move, when the other spouse was present at loading and was not given a bill of lading to sign, it became incumbent upon the carrier to establish that the other spouse was also advised of the limitation issues. In the District Court in Nevada, in *Gallow v. Bekins A-1 Movers, Inc.*, 2007 WL 817622, the court held that a carrier was required to offer a full value rate in order to meet the requirements of a limitation. The carrier, as we often see, offered only the .60cents per pound or the purchase of insurance. This type of decision calls into question the rates and rules offered by some general commodity carriers which provide for levels of limitations, without necessarily offering a full value rate.

Material deviation, long recognized as a way to defeat a limitation in ocean shipments, has been creeping into the domestic transportation field over the last few years. This doctrine holds that when a shipper pays monies for an additional service which is not provided the motor carrier may not limit its liability for a loss related to the failure to provide the requested service. The Federal Court in Texas, in *Toppin Photomasks v. North American Van Lines*, 2007 WL 173904, rejected the extension of that doctrine when the carrier has a written transportation contract with the shipper, concluding essentially that the shipper had every opportunity to negotiate the inclusion of the doctrine in the contract.

WAREHOUSEMAN'S LIABILITY

In *Topliffe v. US Art Co., Inc.*, the insurer of a warehouseman declined coverage based on the policy exclusion for mysterious disappearance. The warehouseman speculated that the plaintiff's property may have been accidentally thrown away with construction refuse. The New York state appellate court held that the declination was improper because a trier of fact could believe the speculative explanation. If so, the disappearance would not be mysterious, and the policy would cover indemnity for a negligent loss. The opinion does not discuss what proof the warehouseman could offer to support its explanation.

In *Admiralty Island Fisheries, Inc. v. Millard Refrigerated Services, Inc.*, the employees of the warehouse stole goods subject to warehouse receipts which limited liability. The Nebraska state

court assumed that the warehouseman would be liable for loss because of its negligence in hiring thieves. The claimant, of course, argued that the theft constituted a conversion which would void the limitation. The court denied the claimant's motion for summary judgment on the grounds that the warehouseman had successfully established that the conversion was not for the benefit of the warehouseman, but only for the benefit of the thieves. The limitation would be voided only if the theft was caused by gross negligence.

IN TRANSIT COVERAGE

The question of whether cargo is in the course of transit for coverage purposes was the subject of a well-reasoned opinion of the Tennessee Court of Appeals in *Cargo Master, Inc. v. Ace USA Insurance Company*. A loaded trailer was left overnight behind a shopping center because the tractor needed repairs. Of course, the trailer was stolen. The insurer of the motor carrier declined coverage on the ground that the parked trailer was not in the course of transit at the time of the theft. The policy did not define "in due course of transit." Surveying cases from other jurisdictions, the court concluded that goods would be in the course of transit when stopped for purposes incidental to the course of the intended transportation. The court said, "Accordingly, we find that the common and ordinary meaning of the terms 'in transit' or 'in due course of transit,' while limited to cargo that is actually en route from one place to the next, contemplates temporary stops which are incidental to the course of transportation. Whether an interruption in the actual movement of the cargo is incidental to the course of transportation depends on the purpose and extent of the stop." The court held it was a question of fact as to whether the stop was incidental to the transportation. This principle would apply to weekend or overnight stops made by a driver for his own convenience.

ILLEGAL TRANSPORTATION

In *ABN Amro Verzekeringen BV, v. Geologistics Americas, Inc.*, referred to above in connection with limitation of liability, the Second Circuit Court of Appeals held that the circumstance that the motor carrier was acting illegally, insofar as it did not have the proper authority to carry cargo in New York intrastate commerce, did not void its contractual limitation of liability. On the other hand, in *Federal Insurance Co. v. P.K. Carriers v. Lloyds*, 2007 WL 489269, a US District court in New York upheld the denial of coverage for damage to a vehicle operated without proper USDOT authority on the grounds that it was engaged in illicit transportation within the meaning of the carrier's insurance policy.

CARRIER DEFENSE

The standard of liability for a carrier, whether under state or federal law, is high. A carrier is a virtual insurer of the goods. A prima facie case is met simply by establishing that goods were delivered to the carrier in good order and condition, returned damaged, with some monetary loss to the shipper. There are the standard common law defenses. It is not often that these defenses are litigated. In *Great West Casualty v. Buchanan Express*, 2007 WL 1376362, the motor carrier denied liability for a loss to a shipment of steel coils, contending that the shipment was damaged as a result of the improper loading of the shipment by the shipper, a standard defense asserted by carriers. However, in this case the motor carrier had entered into a contract with the transportation broker which did not contain the common law defenses but rather stated that the motor carrier was liable for "all loss or damage" The court held that this provision precluded application of the common law defenses and the carrier was liable for the loss.

Carriers also continue to fight shippers who simply reject entire loads without truly determining if the load is damaged. This is most prevalent in the transportation of food grade products as the post 9/11 community looks to reject the full shipment if there is any concern over the condition of any portion of the shipment. The District Court in Wisconsin in *Land O'Lakes v. Superior Service Transportation*, 2007 WL 1847266, refused to permit a food manufacturer to simply decide to dispose of a shipment which the carrier contended suffered minor damages, holding that it would be up to a jury to determine whether the shipper's actions were reasonable. The motor carrier had inspected the product and was able to provide evidence that the load had a substantial salvage value.

While the common law and the Carmack Amendment generally limit recovery to the actual loss or damage to the shipper, it should not be forgotten that a carrier can, on occasion, be held liable for consequential damages. The District Court in Pennsylvania, in *Vulcan Machinery Co. v. Dallas-Mavis Specialized Carrier Company*, 2007 WL 954327 held that where a motor carrier is advised that the terms and conditions of the contract between the buyer and seller mandate delivery by a certain date, the motor carrier can potentially be held liable for consequential damages.

BROKER

Whether a carrier is liable for loss or damage to cargo when the carrier brokers the shipment to someone else was addressed by two courts this year. In the District Court in Idaho in the case of *J.R. Simplot Company v. H&H Transportation*, 2007 WL 220161 we saw a commonly occurring circumstances. A motor carrier had a transportation contract with a shipper. However when a shipment was tendered to the motor carrier it transferred the shipment to its brokerage division, which brokered the load to another carrier.

As expected, there was a loss. The motor carrier attempted to avoid liability on the basis that it simply brokered the load. However the court held that in the absence of a clear delineation between the carrier and brokerage operations the carrier would remain liable as a carrier for brokered loads. A similar result was reached in *Land O'Lakes v. Superior Service Transportation*, 2007 WL 1847266, in which the court held that the retained carrier was liable even if it brokered the load to another carrier.

When is a motor carrier liable for special damages? A question asked often of the cargo lawyers at SFLG&R as claims tries to adjust losses. This month the court in Pennsylvania held that where a motor carrier is advised that the terms and conditions of the contract between the buyer and seller mandate delivery by a certain date, the motor carrier can potentially be held liable for consequential damages. (*Vulcan Machinery Co. v. Dallas-Mavis Specialized Carrier Company*, 2007 WL 954327)

Transportation Seminar - Schindel, Farman, Lipsius, Gardner & Rabinovich and CAB will hold their twenty-first Annual Transportation Seminar in the New York City area on April 14 & 15. Registration is limited and we have been over-subscribed in the past. We suggest that you submit your application by March 1. For applications or additional information please call Blima Levine at (212) 563-1710, Ext. 217. Information and an application are also available on our web site.